such as the law will not enforce that will not of itself prevent the rest from being enforceable.

The point was thus put by Willes J., in the case of *Pickering and another v. The Ilfracombe Railway Co.*[2] :—

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

It was put slightly otherwise by Mr. Leigh in the case of *The Bank of Australasia v. Thomas Chaplin Breillat*[3] .—

"It has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot."

The matter is dealt with in somewhat greater detail by Salter J., in the case of *Putsman v. Taylor*[4] where he said :—

"If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid, as being in undue restraint of trade or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the Court."

The latest discussion on the point is to be found in the case of *Bennett v. Bennett*[5] where Denning L.J., said :—

"If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant."

The agreements in the present case are in writing and it is well settled that the Court will not enquire into the adequacy of the consideration stated in such writing. In my opinion, they are to be read as if the clause relating to occupation of the land before transfer did not exist and they are good and binding contracts for the sale and purchase of the pieces of land in question for $1,370 and $680 respectively. These sums having been paid it follows that in the ordinary course of things, if the defendants had failed to give valid transfers of the lands, the plaintiff would have been entitled to specific performance or to damages for breach.

In the events which have occurred, however, the failure of the defendants to perform their side of the agreements has resulted from supervening impossibility. The contracts are therefore void by reason of section 57 of the Ordinance. It is, however, to be noted that it is not a case of agreements which are void and have never become contracts by reason of illegality but of contracts which have been avoided by circumstances such as are contemplated in section 57. I fail therefore to see any reason why the plaintiff should not recover the purchase money in accordance with section 66.

The second defendant, therefore, must refund to the plaintiff the sum of $680.

There is, however, a certain amount of difficulty as to the promissory note which was executed by him contemporaneously with the two agreements. I am satisfied on the evidence that that note was in fact executed by the first defendant and that no circumstances of fraud attended its execution. On the other hand it was clearly given partly by way of collateral security for the performance of his own contractual obligation and partly by way of security for the performance of the contractual obligations of the second defendant.

In the circumstances justice will be done if judgment is entered against both defendants jointly for $680 and against the second defendant for $1,370 and I order accordingly. Judgment will also be entered against both defendants jointly for the taxed costs of the suit.

*Order accordingly.*

Solicitors : *Cheang Lee & Ong; J. R. Devadas.*

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## PUBLIC PROSECUTOR v. TAN CHYE SENG

[A. Cr. J. (Smith J.) October 25, 1957]

[K. L. — Criminal Appeal No. 37 of 1957]

*Criminal Procedure — Plea of autrefois acquit — Multiplicity of proceedings — Criminal Procedure Code (Cap. 6) s. 302(i) — Courts Ordinance, 1948, 3rd Schedule — Res judicata.*

In this case after the accused had been acquitted on a charge of giving false information to a police officer, he was charged with giving the same information to the Registrar and Inspector of Motor Vehicles. The learned President of the Sessions Court accepted a plea of *autrefois acquit* and acquitted the accused. The Public Prosecutor appealed.

**Held:** (1) this further charge could have been considered at the same time as the first at the first trial and it would therefore be wrong to continue the proceedings and put the accused in jeopardy again;

(2) in the circumstances of the case the plea of *autrefois acquit* was valid.

There may be occasions when it is proper to charge separately an offence which could be tried with another. It is however preferable that any such charge should be preferred at the same time as the principal charge so that it should not appear that the further proceedings are only brought because the first have failed. It is always open to the accused person to request separate trials for particular offences and for the Court so to order if satisfied that the accused would be embarrassed in his defence by dealing with all the charges at the same time, even though such trial is permitted by section 165 of the Criminal Procedure Code (Cap. 6).

*Case referred to:—*

(1) *R. v. Plummer* (1902) 2 K.B. 339, 349.

MAGISTRATE'S CRIMINAL APPEAL.

*Lee Tian Huat* (Federal Counsel) for the appellant.

*S. D. K. Peddie* for the respondent.

**Smith J.** : — The accused was originally charged upon the following two charges:—

"1. That you, Tan Chye Seng s/o Tan Leng Hong, on or about the 9th day of July, 1956 in the District of Kuala Lumpur in the State of Selangor, did cheat one Lee Koon Fook by dishonestly inducing the said Lee Koon Fook to deliver to you the sum of $640, the property of the said Lee Koon Fook, and that you thereby committed an offence punishable under Section 420 of the Penal Code.

2. That you on 28 June 1956, at about 2.55 p.m. at the High Street Police Station, Kuala Lumpur, in the State of Selangor, gave information which was taken down in writing namely, "ON 1st JUNE '56, INTENDING TO RENEW MY ROAD TAX FOR THE CURRENT YEAR, I DISCOVERED THE LOSS OF MY REGISTRATION BOOK. I MADE A THOROUGH SEARCH IN MY PREMISES BUT HAVE NOT YET BEEN ABLE TO DISCOVER THE BOOK TO THIS DATE. I PRESUME THE BOOK WAS LOST WHEN I MOVED ON TRANSFER FROM KLANG TO KUALA LUMPUR", to a Public Servant namely Cpl. 4397, HUSSIN bin SIDEK, which you knew to be false and thereby committed an offence under Section 182 of the Penal Code."

The complaint against the respondent was that he had cheated another person in a car deal. It was alleged that for the purpose of cheating it was necessary that the respondent should obtain a duplicate car registration book from the Registrar and Inspector of Motor Vehicles. Before the R.I.M.V. will issue a duplicate book there is a statutory requirement that a written explanation of the need for a duplicate be given. Whenever the explanation is that the original book has been lost the Registrar requires that a report of the loss be made at a police station. This explains why in this series of cases there are references to reports to the police and reports to the R.I.M.V.

At the trial of these two offences the prosecution produced no evidence relating to the first offence and confined its case to the second charge. At the close of the prosecution case a submission was made on behalf of the respondent as a result of which the accused was acquitted and discharged on the second charge as well as on the first. Subsequent to this acquittal the prosecution preferred the following charge against the respondent:—

"That you on or about the 2nd day of July, 1956, at Kuala Lumpur, in the State of Selangor, did give to a Public Servant, namely, Mr. Bernard Brunton, the Senior Registrar & Inspector of Motor Vehicles, Selangor, an information in writing to wit, the following explanation at para. 3 of an application for duplicate licence made on Form M.V. 8 "on intending to renew my road tax for the current year I discovered that I had lost my registration book. I made a thorough search for it but up till this day it had not been found. I presumed the book must have been lost while I moved on transfer from Klang Police District to Kuala Lumpur Police District" which you knew to be false intending thereby to cause the said Public Servant to issue you with a duplicate Registration Book in respect of motor car No. SC. 8197 which such Public Servant ought not to do if the true state of facts respecting which such information was given were known by him, and that you have thereby committed an offence punishable under section 182 of the Penal Code."

It will be noted that the subject matter of this last charge is exactly the same as that in the second of the original charges upon which he was acquitted except that the report was alleged to be made in the first case to a police officer and in this case to the R.I.M.V. At the trial of this last charge the respondent pleaded *autrefois acquit* under section 302 (i) of the Criminal Procedure Code.

In dealing with this plea the learned President correctly followed the procedure set out in *Sohoni's* Code of Criminal Procedure, 14th edition, page 755, paragraph 4 and proceeded to hear the prosecution evidence before deciding whether or not the plea of *autrefois acquit* would stand.

The question is whether or not the first charge under section 182 of the Penal Code is the "same offence" as that in the second charge under the same section. If in the first trial it has been proved that the statement complained of was true then it is perfectly clear that no offence has been committed by repeating that same remark to the R.I.M.V. If on the other hand the Magistrate, when trying the first offence dismissed the case against the accused because although there was *prima facie* evidence that the report was false discharged the respondent because some other ingredient was lacking, e.g. that there was no evidence to indicate that the report had been made to a police officer or that there was no evidence to indicate that it was likely that the respondent would thereby cause the officer to take some action (see the requirements of section 182 of the Penal Code) then, in that case, it would clearly be proper to charge the respondent with making the same report to the R.I.M.V.

From the original record of the first trial it is not possible to discover the learned President's reasons for discharging the respondent without calling upon him for his defence. It was urged by respondent's Counsel that the acquittal on the first charge must

be accepted as completely acquitting the respondent of every element of the charge and that until the contrary has been shown to be the case the Court must accept the truth of the statement which the respondent is alleged to have made. For this proposition the respondent relied on a passage in *Sohoni* 14th Edition at page 754 which quotes with approval from the case of *R. v. Plummer*[1], the following words :—

"It is a very dangerous practice to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates."

It is probable that the learned President in the first trial held that there was no case to answer because he was not satisfied that any action would follow the making of the report to the police. It may be proper for me to call for the learned President's grounds of decision and discover why he acquitted the accused respondent. If his grounds revealed that he was satisfied that the report was *prima facie* false but he acquitted the respondent for other reasons it might then be proper to hold that the subject matter of this trial was not *res judicata* and this Court could then order the second trial of the respondent to proceed.

Before I exercise my powers to call for the learned President's grounds of judgment I must be satisfied that further prosecution of the respondent is justified.

There may be occasions when it is proper to charge separately an offence which could be tried with another. It is however preferable that any such charge should be preferred at the same time as the principal charge so that it should not appear that the further proceedings are only brought because the first have failed. It is always open to the accused person to request separate trials for particular offences and for the Court so to order if satisfied that the accused would be embarrassed in his defence by dealing with all the charges at the same time, even though such trial is permitted by section 165 of the Criminal Procedure Code.

All the evidence relating to the offence before the R.I.M.V. was produced at the first trial. It is quite clear that it would have been possible to add as a third charge at the first trial the charge relating to the R.I.M.V. by virtue of section 165(i) of the Criminal Procedure Code. It is also clear that there has been multiplicity of proceedings. Indeed, I consider that these proceedings should be dismissed even if the proceedings are not already at the moment *res judicata* by reason of the provisions of paragraph 1 of the Third Schedule of the Courts Ordinance, 1948, which reads as follows:—

"A Court may dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any Court or Courts the proceedings ought not to be continued."

It appears to me that the prosecution, having failed in respect of the report to the constable, has brought substantially the same proceedings under a different guise. Since this further charge could have been considered at the same time as the first at the first trial, I consider that it would in view of the staleness of the offence and the expense to which the respondent has already been put be wrong to continue these proceedings and put him in jeopardy again.

In the circumstances of this case I decline to call for the grounds of judgment in the first case and hold that the truth of the respondent's statement concerning his registration book is *res judicata* and that the plea of *autrefois acquit* is valid.

The appeal is dismissed.

*Appeal dismissed.*

Solicitors : *Bannon & Bailey.*

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## *Re* FONG AH HEE

[R. Cr. J. (Rigby J.) October 23, 1957]

[Penang — Criminal Revision No. 31 of 1957]

*Criminal Procedure — Imprisonment in default of payment of fine.*

*Penal Code, s. 420 — Cheating — Dishonestly inducing complainant to accept and to pay over in cash on "dud" cheque.*

In this revision the prisoner was serving a term of imprisonment in default of payment of fine. The brief facts which led to his conviction were that he produced a "dud" cheque to the complainant with whom he and/or his brother ran a credit account, and on the strength of that cheque dishonestly induced the complainant not only to accept it in settlement of the account owing but also to pay over to him $426 in cash being the balance shown on the face of the cheque in excess of the amount to be settled. The learned President sentenced him to one day's imprisonment and further imposed a fine of $1,426 or one year's imprisonment in default of payment.

**Held:** in the circumstances of the case the imposition of such a fine was virtually tantamount to a peremptory sentence of twelve months' imprisonment and such sentence was excessive.

CRIMINAL REVISION.

**Rigby J.** : — This case has come to my attention in consequence of a perusal of the Monthly September Return from the Superintendent of Prisons of persons serving terms of imprisonment in default of payment of fines.